UPTOWN PROPERTIES SDN BHD A

v.

CHEE PENG ENTERPRISE SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR B
ROHANA YUSUF J
[CIVIL SUIT NO: S4-22-604-2000]
22 MAY 2008

TORT: *Damages - Trespass - Trespass to land - Claim for damages to restore land to original position - No evidence of instability or loss of value caused to land - Nominal damages awarded* C

TORT: *Trespass - Independent contractor - Whether employer liable for independent contractor's act - General rule that employer not liable for acts of independent contractor - Whether exception to general rule applied* D

TORT: *Trespass - Trespass to land - Removal of vegetation from and dumping of soil on plaintiff's land - No evidence of instability or loss of value caused to land - Loss due to trespass not proven - Nominal damages awarded* E

The plaintiff was the owner of the adjacent land to the first defendant's land. The plaintiff alleged trespass against the second defendant who was the contractor engaged to carry out development work on the first defendant's land. The first defendant as the owner of the land was said to be vicariously liable for the same. The F workers of the second defendant, while clearing vegetation on the first defendant's land had inadvertently encroached onto the plaintiff's land and cleared some of the natural vegetation on the plaintiff's land and deposited thereon some loose earth excavated from the first defendant's land. The second defendant had admitted G to the encroachment and had requested the plaintiff for permission to enter the land to remove the earth and debris and to restore the plaintiff's land. However, the plaintiff refused to grant permission and instead commenced the present proceeding. The issues which arose for determination were: (i) whether there was trespass by the second defendant or its agent on plaintiff's land; (ii) whether the H act of trespass caused any damage to the plaintiff's land which entitled the plaintiff to damages claimed; and (iii) whether the first defendant was vicariously liable to the plaintiff. Whilst the second defendant did not dispute trespass, the second defendant claimed that there was no damage to plaintiff's land. The most contentious I issue was the plaintiff's allegation of instability caused to the plaintiff's land due to the dumping of loose soil.

Held (awarding nominal damages for trespass):

(1) The second defendant was an independent contractor of the first defendant. As a general rule, the first defendant cannot be liable for an act of an independent agent appointed. The exception to that general rule as established in the case of *Matania v. Natal Provincial Bank Ltd* and the *Elevenist Syndicate Ltd* is that the liability of employer of an independent contractor will only arise in misconduct or if the work to be done is in its very nature involving risk to the plaintiff. (para 11)

(2) The second defendant was to conduct development work and the first defendant had no control over how the work was to be conducted, save that it followed the contractual terms between them. Thus, the second defendant did not come under the exception to the general rule. The development was to take place on the defendant's land adjacent to plaintiff's land which was full of vegetation. Ordinarily it was not work of special danger. There was no presence of special danger for the first defendant to be personally liable. The first defendant was not liable to the plaintiff. (para 14)

(3) The burden was on the plaintiff to prove that the act of the second defendant in dumping loose earth on the plaintiff's land had caused instability and real damage to the plaintiff's land. The testimonies relied by the plaintiff did not prove instability. The plaintiff failed to substantiate the allegation of instability to his land. (paras 22 & 23)

(4) In relation to general damages, on the removal of vegetation, the plaintiff's land which was removed off some vegetation in the year 2000 was now full of vegetation and shrubs. Further, the plaintiff had not established that the dumping of soil had caused instability to the land. Therefore, no evidence was shown that the value of the land had been reduced resulting from the said trespass. (paras 26 & 27)

(5) As for general damages for reinstating or restoring the land to its original position, such works may have endangered the whole area which was surrounded by residential houses. There was no proven damage to the land though there was interference with the plaintiff's legal right by the defendant's agent. Therefore, the plaintiff should only be awarded with nominal damages. (paras 29, 30, 31 & 32)

Case(s) referred to:

D & F Estates Ltd v. Church Commissioners for England [1988] All ER 992 ***(refd)***

Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor [1993] 3 CLJ 205 SC ***(refd)***

Dodd Properties (Kent) Ltd and Another v. Canterbury City Council and Other [1980] All ER ***(refd)***

Joliffe v. Willmeth & Company And Another [1971] 1 All ER 478 ***(refd)***

Matania v. Natal Provincial Bank Ltd and the Elevenist Syndicate Ltd [1936] 2 All EH 633 ***(refd)***

Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(refd)***

For the plaintiff - Rodney Gomez (KS Lee with him); M/s Shearn Delamore & Co

For the 1st defendant - Harjit Singh; M/s Gill & Tang

For the 2nd defendant - Prakash Menon (Vanaja Nambiar with him); M/s Isharidah, Ho Chong & Menon

Reported by Amutha Suppayah

JUDGMENT

Rohana Yusuf J:

[1] The plaintiff's claim against the second defendant is founded on tort of trespass. The plaintiff is the owner of the adjacent land to the first defendant's land. The plaintiff alleged trespass against the second defendant who was the contractor engaged to carry out development work to build nine units of terrace houses and six units of semi-detached houses on the first defendant's land. The second defendant as the owner of the land is said to be vicariously liable for the same. In its statement of claim the plaintiff set out its prayers in paras. 14(i) to (xi) of the statement of claim. *Vide* a court order dated 8 December 2000 the plaintiff was already granted with various injunctive reliefs and at the outset of the hearing the plaintiff abandoned prayers (i) to (iv). The plaintiff now abandons prayers for specific performance in paras. (v), (vi) and (vii) and confines its remedies to declarations, damages and costs in prayers (viii), (ix), (x) and (xi). In summary, by its pleadings the prayers proceeded with by the plaintiff are for declarations that defendants do provide undertaking to the plaintiff to indemnity and hold the plaintiff harmless against any third party claim and declaration that they will not enter plaintiff's land without written consent. The plaintiff is also seeking for damages and costs.

Brief Facts

[2] The brief facts of the case are these. On, or about 23 August 2000, the workers of the second defendant, while clearing vegetation on the first defendant's land for the development project had inadvertently encroached onto the plaintiff's land. The second defendant has allegedly cleared some of the natural vegetation on the plaintiff's land and deposited some loose earth excavated from the first defendant's land onto the "Northern Slope" of the plaintiff's land (as marked in P22). The second defendant was notified of the encroachment by a letter exhibited as P3 dated 23 August 2000 alleging the said trespass.

[3] Immediately upon receipt of the said letter, the second defendant *vide* their solicitor's letter dated 24 August 2000, agreed to refrain from entering the plaintiff's land (exh. D4). Subsequently, the second defendant *vide* its solicitor's letter dated 28 August 2000 (exh. D5), whilst denying that any damage has been caused to the plaintiff's land, admitted the encroachment and requested the plaintiff for permission to enter the land to remove the earth and debris and to restore the plaintiff's land.

[4] The plaintiff through its solicitors' letter dated 6 September 2000 (exh. D6) refused to grant permission to the second defendant to enter and remove the loose earth or to restore the land, and filed this suit in court and hence the present proceeding.

Issues

[5] The issues before me are these:

(i) Whether there was trespass by the second defendant or its agent on plaintiff's land;

(ii) Whether the act of trespass has caused any damage to the plaintiff's land which entitled the plaintiff to damages claimed; and

(iii) Whether the first defendant is vicariously liable to the claim of the plaintiff.

Liability Of The First Defendant

[6] For convenience, I would like to deal with the third issue first. Learned counsel for the plaintiff, Encik Rodney Gomez contends that the liability of the first defendant is based on the exception to the general rule that, an employer is not vicariously liable to an act of an independent contractor. The exception

according to him as found in the case of *Joliffe v. Willmeth & Company And Another* [1971] 1 All ER 478 is that, an employer can be liable for being negligent in the selection of the independent contractor or if the employer expressly orders and authorises the wrong act. He submitted that the first defendant here was aware of the trespass by the second defendant and failed to prevent the said trespass, especially when the second defendant was permitted to commence clearance and excavation works without ascertaining the boundary or the order for hoarding of site. Encik Rodney argued and cited the case of *D & F Estates Ltd v. Church Commissioners for England* [1988] All ER 992 and contends that the first defendant through its witness DW7 admitted visiting sites prior to 23 August 2000 and admitted that his architect would have done site visits and hence would have been aware of the said trespass. This is particularly so, according to him after receiving notice sent by the plaintiff. With knowledge to be inferred on the part of the first defendant he also contends that the first defendant had condoned negligence on the part of the contractor which would make the second defendant potentially liable as a joint tortfeasor.

[7] In support of his contention Encik Rodney cited the case of *Matania v. Natal Provincial Bank Ltd and the Elevenist Syndicate Ltd* [1936] 2 All EH 633, where it was held that the employer was liable for damages for nuisance since the work in its nature involved risk of damages to the plaintiff. Also cited was the case of *Datuk Bandar Dewan Bandaraya Kuala Lumpur v. Ong Kok Peng & Anor* [1993] 3 CLJ 205, where the employer was held to be liable together with an independent contractor for breach of duty to set up warning signs of defective light.

[8] Learned counsel for the first defendant, Encik Harjit Singh maintains that the second defendant was an independent contractor employed by first defendant to undertake the development project. The development was under the sole management and control of the second defendant. He cited the High Court case of *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508, the learned judge James Fong J (now JCA) states that:

> My concern is that this exception to the general rule of an employer being liable for the act of an independent contracted appointed by him should not be unduly expanded. It must be sparing applied, otherwise there will be a danger in exposing every employer to liability when he engages an independent contractor, such as the professionals in this case, to carry out a project which he himself is unable to handle but has to rely and depend on the skills of such person. It is only in cases where the work involved is of an extra-hazardous nature, and not just hazardous, that the employer assumes full responsibility.

[9] Encik Harjit submitted that the second defendant is having absolute control and management of the said development and the first defendant does not have any control over the construction coordinated by the second defendant. He contends that the exceptions to the general rule are that: if it is the employer's personal fault or the individual agent employed to do unlawful act or if it is a statutory duty or in a strict liability situation, the tort of vicarious liability applies. That exception is not present in this case, according to Encik Harjit.

[10] Encik Harjit also adopted the submission of Encik Prakash Menon for the second defendant on the issue of liability that plaintiff has failed to discharge its burden of proof on the allegations against the second defendant, on instability of slope as well as on damages to the plaintiff's land. He submitted that the remedy sought for re-instatement of plaintiff's land to its original position is unnecessary in view of the present condition of plaintiff's land which is full of thick vegetation.

Findings

[11] From the testimonies and the contractual relation between the first defendant and the second defendant, it is clear that the second defendant is an independent contractor of the first defendant. Under (B-14) the second defendant was appointed as an individual contractor of the first defendant and possession of site was given to second defendant on 24 July 2000. As a general rule, the first defendant cannot be liable for an act of an independent agent appointed. The exception to that general rule as established in the case of *Matania* is that the liability of employer of an independent contractor will only arise in misconduct or if the work to be done is in its very nature, involving risk to the plaintiff. In *Matania* renovation done on the first floor of the building without any precaution being taken against other tenants was held against the employer, by its very nature involving risk.

[12] In *Jollife v. Willmeth & Co And Another* [1971] 1 All ER 478, an employer was held to be liable for the act of an independent contractor only if he is negligent in the selection of the individual contractor or if the employer expressly owned, ratified or authorized the tortuous act. In the case of *D & F Estates Ltd v. Church Commissioners for England* [1988] All ER 992, the judgment of L Bridge held that the main contractor who condones negligence on the part of the sub-contractor would be potentially liable as a joint that tortfeasor.

[13] The Supreme Court case of *Datuk Bandar* held that the employer (Datuk Bandar) was liable because the situation created was extra hazardous involving special danger to lift users and the *Bandaraya* has statutory duty to maintain lifts under the Factories and Machineries Act 1967. As such it could not therefore escape liability. In my view these cases would not help the plaintiff because the relationship between the main contractor and sub-contractor by its very nature differs from the relation between an employer and an independent contractor, as in this case.

[14] I agree with the decision in *Steven Phoa Cheng Loon v. Highland Properties Sdn Bhd*, on this issue. The facts of that case with the present are quite similar. The second defendant here is employed to conduct development work on first defendant's land. The first defendant would have no control over how the development work to be conducted, save that it follows the contractual terms between them. The second defendant is free to act within such contract terms. From that standpoint the second defendant is an independent contractor and will not come under the exception to the general rule. There is no personal duty of the employer here as there is no special danger to others such as on dangerous highways. The development is to take place on the defendant's land adjacent to plaintiff's land which is full of vegetation. Ordinarily it is not work of special danger as stated in all the decided cases like as in *Matania* or in *Datuk Bandar*. From the circumstances of the present case, I do not find the presence of special danger for the first defendant to be personally liable. I therefore hold that the first defendant is not liable to the claim of the plaintiff.

[15] Thus the claim of the plaintiff against the first defendant is hereby dismissed with costs.

Trespass

[16] The second defendant did not dispute trespass. The second defendant acknowledged that some trees on the plaintiff's land were felled and soil was dumped on plaintiff's land. However it is the second defendant's case that despite the trespass there was no damage to plaintiff's land as alleged. From the photographs shown in exhs. P33A to P33I there are evidence that there were trees felled on the plaintiff's land by the same defendant. PW2, in his evidence claims that about 100 trees have been felled. He visited the site on plaintiff's instruction but he did not know what was the state of plaintiff's land before that. He saw new uprooted trees being

dumped on the plaintiff's land and he claimed to have counted about 100 trees but he could not produce photos of 100 trees or any documentary evidence to that effect.

[17] From the testimonies before me I find that there were some trees being felled but it is on the plaintiff's land basing on the evidence and photographs shown in P33A to P33F. There must be trees felled but it is 100 trees or not is a mere speculation by PW2. Thus I find that there was trespass by reason of felling of trees on plaintiff's land. The issue of damages will be dealt with in the foregoing paragraphs.

Instability Of Slope

[18] The most contentious part of the claim of the plaintiff is on the allegation of instability of the northern slope of the plaintiff's land due to the dumping of loose soil. The plaintiff's case is that the second defendant's agent deposited excavated loose soil on the plaintiff's land. The plaintiff contends more than 90 to 100 cubic meters of earth were dumped as testified by DW8. Encik Rodney submits that the dumping may have taken place in early August and may not only be for two days. The plaintiff contends that the excavation and dumping was extensive as evidenced from the photographs in exhibits in bundles B pp. 45 to 54. Encik Rodney also suggests that the picture in P33I shows there were two excavators including a track hydraulic chain excavator (which can excavate earth as testified by DW8) which would indicate that huge amount of loose soil were dumped.

[19] The plaintiff relies on the following evidence to prove instability:

(i) PW1 testifies that from a visual inspection made by him together with PW2, they noticed that there was soil erosion on the slope.

(ii) PW2 says he saw gullies formed on the northern slope of the plaintiff's land as a result of erosion which indicates instability on the slope. PW2 clarifies that gullies means welter that has flown on top of loose material and form deep channels after eroding the softer part. PW2 in his testimonies said during some site visits he noticed localized land slip on the northern slope of the plaintiff's land.

(iii) The plaintiff's expert, Ir Lum Peng Fatt (SP5) also testified that during his visit to the site two years after the trespass he saw evidence of surface erosion at the slope. He suggested that the surface of the slope should be protected to prevent further erosion. From the site visit, together with information provided by the plaintiff, SP5 prepared a report recommending the type of work and estimated quantity required to stabilize the slope (exh. P27).

[20] Encik Rodney submits that the precariousness of the northern slope on the plaintiff's land is evident from the photographs. At exh. P21F, the northern slope is at the left of the picture and there is clear evidence of loose earth being dumped on the slope (see SP2's testimony). From this photo, there is no visible support to the slope and a large tree is suspended precariously at the edge of the slope. The pictures of the northern slope in exhs. P33E and P33J (taken from same angle) also show the steep gradient and some trees that have fallen on the slope.

[21] Encik Prakash Menon for the second defendant submits that even if there is an act of deposition of loose earth on the plaintiff's land and the clearing of some natural vegetation, they do not cause any damage to the plaintiff or instability to the slope of the plaintiff's land. He submits that the plaintiff has failed to proof real damage and thus only nominal damages would be appropriate to compensate the plaintiff for the infringement of its legal rights. He contends that the plaintiff has failed to prove instability because none of the plaintiff's witnesses has substantiated that the plaintiff's land or rather its northern slope has become instable.

Findings On Instability

[22] It is trite law that the burden is on the plaintiff to prove that the act of the second defendant in dumping loose earth on the plaintiff's land has caused instability and real damage to the plaintiff's land.

[23] From the evidence that has been adduced, I agree with Encik Prakash Menon that, at the onset the allegation of instability of the plaintiff's land was a forgone conclusion by PW1. As early as the first notice issued in P3 dated 23 August 2000 to the second defendant para. 4(iv) had already alleged trespass affecting instability. This goes to show that even before anything PW1 had made up his mind that there was instability to his land. However, in his evidence in cross-examination he does not remember, when asked if there is evidence that the land was unstable. His earlier conclusion on instability was based on the erosion on the slope by visual

inspection during his early visits. He was not aware of any evidence of instability then, and he also states that there is no evidence now to show that dumping caused instability. He further testified that he is to rely on an expert opinion which will be produced to support his allegation on instability. The expert evidence of representative of Bumimetro Engineering Corporation was to be relied upon. The report of Bumimetro was produced to court as exhibited in P26 by Encik Chang Sek Kong testified as PW4. P26 is a report prepared by Bumimetro described as 'Soil Investigation Work At Lot 3039, Mukim KL. However in cross-examination PW4 explained that his soil investigation work does not determine instability. He in fact confirmed that he was setting out analysis of soil test result in the report. He was not aware of the dumping location but knew of the alleged dumping based on the information given by PW1 to him. The testimonies of PW4 in my view cannot advance the claim by the plaintiff that there was instability of plaintiff's land because quite obviously PW4 was not conducting investigation on instability.

[24] The next evidence is from witness PW5, Mr Lum Peng Fatt a professional Civil Engineer in Messr. Teknologi Lengkap Perunding who tendered a report on earth work and damage on the plaintiff's land dated 19 June 2002. He visited site in 2002. He used the Bumimetro report for investigation. In cross-examination he said he was not engaged to determine stability, and he made no report on instability because that would be outside his scope. He also informed he was instructed to remove earth by the client and suggested closed turfing to prevent surface erosion. He saw surface erosion, and when put with the question that the Land is now full of vegetation he said that would be sufficient to prevent erosion. He maintained that it was upon the instruction of the client that he quoted for the soil to be removed.

[25] Quite clearly, the testimonies relied by the plaintiff do not help to prove instability. Some of the evidence especially for work done is based on the presumption of instability but none of them makes a finding of instability. Basing on all these, I find that the plaintiff has failed to substantiate the allegation of instability to his land.

Damages

[26] The plaintiff is seeking for general damages. On the removal of vegetation it is obvious that the land of the plaintiff which was removed off some vegetation in the year 2000 is now full of vegetation and shrubs as evidenced from a site visit conducted on 23 February 2007. In fact the Dewan Bandaraya Kuala Lumpur has given notice to the plaintiff to clear the Land from thick growth.

[27] The next act of trespass is the soil dumping. Whilst it is not disputed that there were some clumping of soil, the plaintiff has not been able to establish that the dumping has caused instability to the land. Encik Rodney submitted that in case of damages to land the measure of damages is to put the injured party in the same position as he would have been, if he had not suffered the wrong complained off. Thus he contends that the damages is to be based on either; diminution in value of the land, or cost of reinstatement or restoration of the land.

[28] No evidence is shown that the value of the land has been reduced resulting from the said trespass. The plaintiff is seeking general damages, which was based on the costs of reinstating or restoring the land to its original position. Evidence were produced by the plaintiff as to what it takes to remove the dumped soil. In the testimonies of SP2 it would first involve the preparing of excess road with concrete pavers. Trees and vegetation need to be cleared. The dumped soil will then have to be removed, after which turfing will be required to cover up exposed soil. At the same time drainage will be necessary. Then trees will be planted back on the Land. All these works will cost RM1,280,000 though the original quotation given in 2001 was for RM1,247,500. However given the inflationary rate it would be fair to increase. The drainage work is RM53,600 (see B84).

[29] Now what is the whole purpose in all these steps? It is to restore the Land to its original position and to ensure stability of the slope. The plaintiff has not established instability. The development has commenced and completed. To date no sign or evidence of instability has been shown to court. In cross-examination by Encik Prakash Menon - PW1 confirmed these:

> Q Now in 2006 - Do you have evidence to show between 2000 to date there has been evidence of instability?
>
> A No, not that I know that.

[30] If as contended by Encik Rodney the purpose is to stabilize the slope, in absence of instability being established there is no necessity for such works. I would not be wrong to assume after my visit to the site that such work may even endanger the whole area which are surrounded by residential houses of Taman Seputih in Kuala Lumpur.

[31] I have examined the English case of *Dodd Properties (Kent) Ltd and Another v. Canterbury City Council and Other* [1980] All ER. Donaldson LJ has this to say about the principle involved:

> What is appropriate choice between the diminutions in value or cost of restoration will depend on a number of factors, such as plaintiff's future intentions as to the use of property and reasonableness of these intentions. If he reasonably intends to sell the property in its damaged state, clearly the diminution in value is the true measure. If he intends to continue to occupy it and to repair the damage, clearly the costs of repair is the true measure and, there may be in between situations.

[32] In this case the plaintiff is not in occupation of the Land. There is no proven damage to the land and there is no reason to reinstate it just as the same way that it should not be replanted with trees as it is now already full of vegetation. I agree with the submission of Encik Prakash Menon that there is no case established on damages caused to the plaintiff's land though there were interferences with the plaintiff's legal right by the defendant's agent. For that reason I would agree that the plaintiff should only be awarded with nominal damages.

[33] I take note that, from the testimonies before me the second defendant had offered through its solicitor's letter of 28 August 2000 *vide* exh. B-30 to remove the dumped soil right from the time of the incident, when the plaintiff issued notice on encroachment on 24 August 2000 *vide* exh. P3 to the second defendant. The plaintiff went ahead and filed this action on 26 August 2000 even before replying to the offer by second defendant to remove the dumped soil. It was because of the plaintiff's refusal in its letter of 6 September 2000 that the second defendant was not able to remove the dumped soil. In the testimonies of witness for the defendant it would only cost them RM1,000 to remove the dumped soil then, because all their workers and machineries were on site.

[34] Given that the costs of removal of soil then was only RM1,000 and bearing in mind the defendant's testimony may be at the lower scale, I allow nominal damages of RM1,500 for the trespass of soil dumping and RM500 for the trespass of vegetation clearance together with costs and judgment interest as prayed.